Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
CROSS-PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's entry of a preliminary injunction barring enforcement of a federal statutory ban on the knowing provision of "personnel" or "training" to entities designated by the Secretary of State as foreign terrorist organizations.

PARTIES TO THE PROCEEDINGS

The cross-petitioners in this case are Janet Reno, as Attorney General of the United States; the United States Department of Justice; Madeleine Albright, as United States Secretary of State; and the United States Department of State. The cross-respondents are Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northen California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

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No.

JANET RENO, ATTORNEY GENERAL, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, the United States Department of Justice, the United States Secretary of State, and the United States Department of State, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)* is reported at 205 F.3d 1130. The opinion of the district court (Pet. App. 17a-84a) is reported at 9 F. Supp. 2d

* References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Humanitarian Law Project* v. *Reno*, No. 00-910.

1176. The district court's findings of fact and conclusions of law (Pet. App. 85a-110a) are reported at 9 F. Supp. 2d 1205.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. A petition for rehearing was denied on September 1, 2000 (Pet. 1; see Pet. App. 111a-112a). The petition for a writ of certiorari in *Humanitarian Law Project* v. *Reno*, No. 00-910, was filed on November 29, 2000, and was placed on this Court's docket on December 4, 2000. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and proceedings below are fully set forth in the government's brief in opposition in *Humanitarian Law Project* v. *Reno*, No. 00-910. In brief, this case involves a constitutional challenge to provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Section 302 of AEDPA authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate an entity as a "foreign terrorist organization" if she finds that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in [8 U.S.C.] 1182(a)(3)(B) * * *); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1) (Supp. IV 1998).

Designation of a group as a "foreign terrorist organization" under AEDPA has three legal consequences. First, United States financial institutions possessing or

controlling any funds in which a designated foreign terrorist organization or its agent has an interest are required to block all financial transactions involving those funds. 18 U.S.C. 2339B(a)(2) (Supp. IV 1998). Second, representatives and specified members of a designated foreign terrorist organization are inadmissible to this country. 8 U.S.C. 1182(a)(3)(B) (Supp. IV 1998). Third, it is illegal for persons within the United States or subject to its jurisdiction to "knowingly" provide "material support or resources" to a designated foreign terrorist organization. 18 U.S.C. 2339B(a)(1) (Supp. IV 1998). The Act defines "material support or resources" to mean "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. 2339A(b) (1994 & Supp. IV 1998); see also 18 U.S.C. 2339B(g) (4) (Supp. IV 1998).

Two United States citizens and six domestic organizations brought suit in federal district court, challenging the constitutionality of the relevant provisions of AEDPA. Those plaintiffs are the petitioners in No. 00-910 and the cross-respondents in this case. One citizen (Nagalingam Jeyalingam) and five of the organizations alleged that they wish to provide cash and various other types of support to the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers). The other citizen plaintiff (Ralph Fertig) and the remaining plaintiff organization (the Humanitarian Law Project) alleged that they wish to provide cash and other support to the Kurdistan Workers' Party (PKK). Both the Tamil Tigers and the PKK were among 30 entities designated by the Secretary of State as foreign terror-

ist organizations pursuant to AEDPA, 62 Fed. Reg. 52,650 (1997), and both were redesignated in October 1999, see 64 Fed. Reg. 55,111 (1999), when their original designations expired under the terms of the Act. The plaintiffs contended that the AEDPA restrictions on material support to the Tamil Tigers and the PKK violate the First and Fifth Amendments.

The district court denied cross-respondents' request for preliminary injunctive relief with respect to most of the challenged AEDPA provisions, but granted a preliminary injunction against enforcement of two of the Act's provisions. Pet. App. 17a-84a (opinion), 85a-110a (findings of fact and conclusions of law). The court concluded that as a general matter, the AEDPA ban on the provision of material support to designated foreign terrorist organizations is constitutional because it serves a substantial governmental interest, is not directed at the content of political expression, and leaves would-be donors free to engage in alternative forms of political advocacy and association. *Id.* at 32a-79a. The court held, however, that cross-respondents had demonstrated a probability of success on their contention that the terms "personnel" and "training," which are included within the statutory definition of "material support or resources," are too vague to satisfy constitutional requirements because they do not adequately inform reasonable people as to the range of conduct forbidden by the statute. *Id.* at 79a-83a. The district court entered a preliminary injunction barring the enforcement of 18 U.S.C. 2339B (Supp. IV 1998) against any of the named cross-respondents or their members for providing "training" or "personnel" to the Tamil Tigers or the PKK. Pet. App. 83a-84a n.31, 109a-110a.

Both sides appealed from the portions of the district court's ruling that were adverse to them. The court of appeals affirmed the district court's judgment in its entirety. Pet. App. 1a-16a. With respect to AEDPA's ban on the provision of "training" and "personnel" to designated organizations, the court of appeals affirmed the district court's entry of a preliminary injunction in favor of the cross-respondents. *Id.* at 13a-15a. The court concluded that "[b]ecause [cross-respondents] have demonstrated that they are likely to succeed on the merits of their claim with respect to the terms 'training' and 'personnel,' * * * the district court did not abuse its discretion in issuing its limited preliminary injunction." *Id.* at 15a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

As our brief in opposition in No. 00-910 explains, the court of appeals correctly upheld most of the relevant provisions of AEDPA that are at issue in this case. As the court of appeals recognized, there is no right protected by the Constitution to donate cash or goods to terrorist organizations outside the United States. That aspect of the court of appeals' decision does not warrant this Court's review.

If this Court does grant the petition in No. 00-910, however, its review of AEDPA's constitutionality should also encompass the court of appeals' affirmance of the district court's grant of a preliminary injunction barring enforcement against cross-respondents and their members of the Act's ban on the provision of "personnel" or "training" to designated foreign terrorist organizations. The district court found that cross-respondents had demonstrated a probability of success on their contention that those two provisions are

unconstitutionally vague. The court of appeals upheld the preliminary injunction, finding that the district court had not abused its discretion. However, the district court's ruling on that point presented a pure question of law; the court of appeals erred in declining to accept the government's narrowing construction of the term "personnel," and in ruling that cross-respondents had established a probability of success on their contention that the term "training" is unconstitutionally vague because of occasional potentially problematic applications of that term.

1. As a basic principle of due process, criminal prohibitions must give a person of ordinary intelligence "fair warning" as to the range of conduct that is prohibited, and must establish adequate guidance to govern the exercise of discretion by executive officials in order to avoid arbitrary and discriminatory enforcement. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). To satisfy that requirement, the Government need not define an offense with "mathematical certainty" (*id.* at 110), but must only provide "relatively clear guidelines as to prohibited conduct." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994). And because some exercise of enforcement discretion is inevitable, *Grayned*, 408 U.S. at 114, Congress need only "establish minimal guidelines to govern law enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)).

Although greater statutory precision is required when the government imposes criminal sanctions or when the statute "abut[s] upon sensitive areas of basic First Amendment freedoms" (*Grayned*, 408 U.S. at 109 (quoting *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964)), even in those contexts "due process does not require

'impossible standards' of clarity." *Kolender*, 461 U.S. at 361. Moreover, where, as here, the statute includes a scienter requirement ("[w]hoever * * * knowingly provides material support or resources," 18 U.S.C. 2339B(a)(1) (Supp. IV 1998)), vagueness concerns may be mitigated, "especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Posters 'N' Things, Ltd.*, 511 U.S. at 526 (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). And if a class of offenses can be made constitutionally definite by a reasonable construction of the statute, the courts are under a "duty to give the statute that construction." *United States* v. *Harriss*, 347 U.S. 612, 618 (1954). Such a construction is possible here.

2. AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations is clearly aimed at denying such organizations the human resources necessary to carry out their objectives. The term "personnel" generally describes employees or others working under the direction or control of a specific entity. See *Webster's Ninth New Collegiate Dictionary* 878 (1989) ("a body of persons usu. employed (as in a factory, office, or organization)"). Moreover, AEDPA prohibits giving "personnel" "*to*" designated foreign terrorist organizations. See 18 U.S.C. 2339A(b) (1994 & Supp. IV 1998); 18 U.S.C. 2339B(a)(1) (Supp. IV 1998) (emphasis added). That proscription covers situations in which individuals have submitted themselves to the direction or control of a foreign terrorist organization. It is not naturally understood to apply to independent actions, such as writing letters on one's own to support or further the aims of an organization. Such independent advocacy of a desig-

nated organization's interests or agenda is outside the coverage of the statute.

So construed, the term "personnel" would give constitutionally adequate notice to the public of what is prohibited and would not implicate a substantial amount of constitutionally protected activity. Rather, the primary effect of such a ban is to prevent the provision of mercenaries, terrorists, and many other actors whose activities do not even arguably implicate the First Amendment. Any independent speech in favor or on behalf of a foreign terrorist organization would not be prohibited by the statute. By contrast, speech that is conducted under the control or direction of a foreign terrorist organization is either entitled to no First Amendment protection at all (*e.g.*, writing ransom demands or threatening the lives of civilians), or at most receives only limited First Amendment protection, since the speaker has by definition agreed to subordinate his own views to those of the foreign entity. See *Palestine Info. Office* v. *Shultz*, 853 F.2d 932, 939 (D.C. Cir. 1988) (upholding State Department order closing Palestine Liberation Organization (PLO) office in Washington, D.C., and preventing a United States citizen from representing the PLO).

Even assuming, arguendo, that a particular application of the ban to a person speaking under the direction or control of a foreign terrorist organization might raise significant First Amendment questions, that prospect does not warrant facial invalidation of the term "personnel" or the granting of an injunction that apparently precludes prosecution of cross-respondents or their members under Section 2339B for the provision of mercenaries or suicide bombers to the PKK or LTTE (Pet. App. 109a-110a). See *Hill* v. *Colorado*, 120 S. Ct. 2480, 2498 (2000) ("speculation about possible

vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications'").

The court of appeals did not hold that the term "personnel" would be impermissibly vague, or that it would trench unduly upon constitutionally protected activities, if the statutory ban were limited to persons acting under the direction or control of foreign terrorist organizations. Rather, it refused to accept that limiting construction because it believed that the district court's entry of a preliminary injunction was subject to a deferential standard of review, and because it regarded that limiting construction as effectively rewriting the statute. See Pet. App. 14a-15a. In fact, however, the limiting construction is wholly reasonable and should therefore be adopted—particularly if the alternative is facial invalidation of the "personnel" prohibition. Moreover, the concerns expressed by the court of appeals about AEDPA's potential effect on independent advocacy (*id.* at 14a) are obviated by our limiting construction, which clearly and definitively excludes independent advocacy from the scope of the criminal prohibition.

3. The court of appeals similarly upheld the district court's preliminary injunction barring enforcement against cross-respondents or their members of AEDPA's ban on the provision of "training" to designated foreign terrorist organizations. However, the term "training" is readily intelligible to the average person, and the statutory ban does not so "significantly compromise recognized First Amendment protections" as to merit facial invalidation. See *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

The verb "train" is commonly understood to mean: "to teach so as to make fit, qualified, or proficient." *Webster's Ninth New Collegiate Dictionary* 1251 (1989). As a general matter, helping foreign terrorists achieve proficiency obviously is not a protected First Amendment activity. Thus, the statutory ban quite properly precludes the training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds. There is simply no reasonable argument that most "training" is protected First Amendment activity.

The court of appeals hypothesized two examples of training that might raise First Amendment concerns: instructing members of a designated organization on how to petition the United Nations, and teaching international law to such members. Pet. App. 15a. But neither the possibility of such applications, nor the presence in this particular case of the unusual plaintiff who wishes to "train" a designated foreign terrorist organization in political advocacy and the use of international law, provides an adequate basis for the court of appeals' judgment. To begin with, it is far from clear that the statutory ban on the provision of "training" would be unconstitutional even as applied to the activities identified by the court of appeals. As with the provision of cash or goods, support through "training" even of a foreign terrorist organization's seemingly innocuous activities may have the effect of making other resources available for violent acts.

In any event, AEDPA's ban on the provision of "training" to designated organizations is surely constitutional in the vast majority of its intended applications, see *Hill* v. *Colorado*, 120 S. Ct. at 2498, and this Court has "never held that a statute should be held invalid on its face merely because it is possible to

conceive of a single impermissible application," *City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)). Since "the general class of offenses to which the statute is directed is plainly within its terms," the prohibition on training should not "be struck down as vague even though marginal cases could be put where doubts might arise." *Harriss*, 347 U.S. at 618. That is particularly true here, because AEDPA's ban on the provision of training, personnel, and other material support to designated foreign terrorist organizations serves compelling national security and foreign policy interests, and because facial invalidation would apparently preclude prosecution under Section 2339B for training foreign terrorists on how to build bombs or use explosives.

CONCLUSION

If the petition for a writ of certiorari in No. 00-910 is granted, this cross-petition should also be granted. If the Court denies the petition in No. 00-910, this cross-petition should be denied.

Respectfully submitted.

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No. 00-1077

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IN THE

Supreme Court of the United States

JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; MADELEINE ALBRIGHT, as United States Secretary of State; and UNITED STATES DEPARTMENT OF STATE,

Cross-Petitioners,

—v.—

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; and NAGALINGAM JEYALINGAM,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Antiterrorism and Effective Death Penalty Act of 1996 is void for vagueness under the First and Fifth Amendments to the United States Constitution insofar as it criminalizes the provision of "personnel" and "training" to the lawful, nonviolent activities of selectively designated foreign organizations.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and cross-appellees in the court of appeals, and are conditional cross-respondents in this Court: Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

The following parties were defendants in the district court and cross-appellants in the court of appeals, and are conditional cross-petitioners in this Court: the Attorney General of the United States, who was Janet Reno at the time this petition was filed; the United States Department of Justice; the United States Secretary of State, who was Madeleine Albright at the time this petition was filed; and the United States Department of State.

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 205 F.3d 1130. The opinion of the district court (App. 17a- 84a) is reported at 9 F. Supp.2d 1176.[1] The district court's findings of fact and conclusions of law (App. 85a-110a) are reported at 9 F. Supp.2d 1205.

JURISDICTION

The court of appeals entered its judgment on March 3, 2000. A petition for rehearing was denied on September 1, 2000. App. 111a-112a. A petition for a writ of certiorari in *Humanitarian Law Project v. Reno*, No. 00-910, was placed on this Court's docket on December 4, 2000. This conditional cross-petition in *Reno v. Humanitarian Law Project*, No. 00-1077, was placed on this Court's docket on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution, as well as relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, in particular 18 U.S.C. §2339B and 8 U.S.C. §1189, are reprinted at App. 113a-126a.

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[1] References herein to "App." are to the appendix to the petition for a writ of certiorari in *Humanitarian Law Project v. Reno*, No. 00-910. References to "Cross-Pet." are to the Cross-Petition for a Writ of Certiorari.

STATEMENT

Cross-Respondents rely on the Statement in their Petition for a Writ of Certiorari in *Humanitarian Law Project v. Reno*, No. 00-910, and supplement it with the following statement of the facts and proceedings below that specifically relate to the conditional cross-petition.

Under AEDPA, the provision of "material support or resources" to any foreign organization that has been designated by the Secretary of State as terrorist is a crime punishable by up to 10 years of imprisonment. 8 U.S.C. §2339B(a)(1); App. 115a. AEPDA broadly defines "material support or resources" to include, without limitation, all "personnel" and "training."[2] 8 U.S.C. §2339A(b); App. 118a.

On June 8, 1998, the district court held that the plaintiffs had demonstrated a likelihood of success on their claim that AEDPA's prohibitions against the provision of "personnel" and "training" to designated organizations are unconstitutionally vague. App. 79a-83a. The district court concluded that these terms are "not 'sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited."'" App. 79a (citations omitted). In addition, the district court concluded that the terms "appear to prohibit activity protected by the First

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[2] The full definition of "material support or resources" in AEDPA encompasses "currency or other financial securities, financial services, lodging, *training*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel*, transportation, and other physical assets, except medicine or religious materials." 8 U.S.C. §2339A(b); App. 118a (emphasis added).

Amendment – distributing literature and information and training others to engage in advocacy."[3] App. 82a.

The district court rejected the government's proposal that the term "personnel" be narrowly construed to include only individuals working at the direction or control of a designated organization, concluding that such a construction is unsupported by any language in AEDPA. App. 80a. On the same grounds, the district court rejected the government's proposal that the term "training" be narrowly construed to include only training on such subjects as "how to use weapons, build bombs, or raise funds." App. 81a.

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[3] As the district court noted, three of the plaintiffs had engaged in activities protected by the First Amendment prior to the enactment of AEDPA, and these plaintiffs were seeking a preliminary injunction barring the government from prosecuting them for continuing to engage in these activities. The Humanitarian Law Project (HLP) and Ralph Fertig, HLP's President, had "advocated for the [Kurdistan Workers Party (PKK)] before the U[nited] N[ations] Commission on Human Rights, petitioned members of Congress, and advocated for the freedom of four Turkish political prisoners convicted of being PKK members or supporters." App. 80a. The district court explained that "HLP and Judge Fertig would like to but are afraid[, as a result of AEDPA's criminalization of the provision of 'personnel' and 'training' to designated organizations,] to write and distribute publications supportive of the PKK and work with PKK members at peace conferences and other meetings toward the cause of peace and justice for the Kurds." App.80a-81a. Additionally, the World Tamil Coordinating Committee was engaged in "distribut[ing] literature and informational materials [of the Liberation Tigers of Tamil Eelam (LTTE)] throughout the United States to advocate on behalf of the Sri Lankan Tamils' human rights." App.81a.

The remaining plaintiffs seek to support the entirely lawful and peaceful humanitarian efforts of either the PKK or LTTE. App. 20a. None of the plaintiffs seeks to support any terrorist activities or any unlawful conduct. App. 20a-31a.

The district court also rejected the government's argument that the vagueness of the terms "personnel" and "training" is mitigated by AEDPA's requirement that the "personnel" and "training" be "knowingly" provided. The district court observed that AEDPA's scienter requirement extends only to the knowing provision of "personnel" and "training," and fails to cure the lack of clarity as to what constitutes "personnel" and "training." App. 82a.

The district court found that plaintiffs had established irreparable injury because AEDPA's prohibitions against the provision of "personnel" and "training" to designated organizations infringed upon their First Amendment rights. App. 83a at n.30. Having concluded that plaintiffs had demonstrated a probability of success on the merits and irreparable injury, the district court proceeded to issue a preliminary injunction barring the government from enforcing these prohibitions against plaintiffs and the members of the organizational plaintiffs.[4] App. 83a at n. 31.

On March 3, 2000, the court of appeals unanimously affirmed the preliminary injunction issued by the district court. App. 13a-16a. The court of appeals agreed with the district court's legal analysis and "conclude[d] that the district court did not abuse its discretion in issuing its limited preliminary injunction." App. 15a.

The court of appeals concluded that the term "personnel":

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[4] The district court denied plaintiffs' request that the preliminary injunction be nationwide in scope, commensurate with the Attorney General's nationwide authority over the enforcement of AEDPA. Instead, the district court narrowly crafted a preliminary injunction that extended no further than plaintiffs and their members. App. 83a at n. 31.

> blurs the line between protected expression and unprotected conduct. Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits under the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment.

App. 14a (citation omitted). Like the district court, the court of appeals rejected the government's request that it read into the term "personnel" a "requirement that the activity prohibited be performed 'under the direction and control' of a foreign terrorist organization." *Id.* The court of appeals explained that "we are not authorized to rewrite the law so it will pass constitutional muster." App. 14a-15a.

The court of appeals raised similar concerns with respect to the term "training":

> Again, it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term "training." The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet presumably, this definition would encompass teaching international law to members of designated organizations.

App. 15a.

Finally, the court of appeals, like the district court, rejected the government's argument that any vagueness problems are cured by AEDPA's scienter requirement. App. 15a at n.5. As the court of appeals explained, "the term 'knowingly' modifies the verb 'provides,' meaning that the only scienter requirement ... is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support." App. 15a-16a.

REASONS FOR DENYING THE WRIT

The conditional cross-petition should be denied. The government has failed to identify a single decision from any court, much less this Court or a court of appeals, that is in conflict with the portions of the decisions below that form the basis of the government's conditional cross-petition. Both the court of appeals and the district court correctly applied clearly established and uncontroverted principles of constitutional law. Their conclusions that AEDPA's prohibitions on the provision of "personnel" and "training" are unconstitutionally vague, and that the government should be preliminarily enjoined from prosecuting plaintiffs and the members of the plaintiff organizations for violating these provisions, are firmly grounded and raise neither new nor significant questions of law.[5]

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[5] The government's argument that the court of appeals erred in applying an abuse of discretion standard in reviewing the grant of the preliminary injunction, Cross-Pet.6, is without basis. "[T]he grant or denial of a preliminary injunction remains a matter for the trial court's discretion, which is exercised in conformity with historic federal equity practice." 11A Wright & Miller, Federal Practice and Procedure §2947 (citations omitted). It is for this reason that, "in reviewing such interlocutory relief, [the

This Court has repeatedly held that criminal statutes which threaten to chill speech and associational rights are void for vagueness when they lack clarity and precision. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The courts below recognized that AEDPA's prohibitions on the provision of "personnel" and "training" to designated organizations have the apparent effect of criminalizing virtually all human activity on behalf of such organizations, including a substantial amount of core political speech and advocacy entitled to First Amendment protection. App. 13a-15a, 81a-82a. In light of these First Amendment concerns, the courts found AEDPA's criminal prohibitions to be unconstitutionally vague because they are not "'sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited."'" *see* App. 13a-14a, 79a (citations omitted).

The vagueness of the challenged provision is illustrated by the predicament in which several of the plaintiffs found themselves after AEDPA's enactment. Fearing criminal investigation and prosecution, HLP and Fertig refrained from engaging in pure First Amendment activities in which they had freely engaged prior to AEDPA. These activities included political advocacy on behalf of the PKK before such bodies as the United Nations Commission on Human Rights and the United States Congress, writing and distributing publications supportive of the PKK, and supporting the PKK at peace conferences and other meetings

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reviewing court] may only consider whether the issuance of the injunction constituted an abuse of discretion." *Brown v. Chote*, 411 U.S. 452, 457 (1973). However, the court of appeals clearly recognized, by its citation to *Does 1-5 v. Chandler*, 83 F.3d 1150 (9th Cir. 1996), that "issues of law underlying the decision [to grant a preliminary injunction] are reviewed de novo." *Does 1-5*, 83 F.3d at 1152 (citations omitted); App. 15a.

towards the cause of peace and justice for the Kurds. App. 20a-25a. All of these activities could potentially be construed as providing "personnel" to the PKK, and could therefore subject plaintiffs to up to 10 years in prison. Indeed, any volunteer effort for a designated group could constitute the provision of "personnel" – including pure advocacy – and any assistance or educational activities could be treated as "training."

The government contends that the vagueness of the term "personnel" can be cured by limiting it to "employees or others working at the direction or control of a specific entity." Cross-Pet. 7. But, as the courts below unanimously concluded, this construction lacks any support in the language of AEPDA. As the Ninth Circuit explained, citing, *inter alia*, this Court's decision in *Swain v. Pressley*, 430 U.S. 372, 378-79 n.11 (1977), "[w]hile [the courts] construe a statute in such a way as to avoid constitutional questions, ... [the courts] are not authorized to rewrite the law so it will pass constitutional muster." App. 14a (citations omitted).[6]

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[6] Notably, the government's interpretion of the term "personnel" as work performed "under the direction or control of a specific entity" would not save the statute. Activities such as writing, speaking, and distributing literature are still protected under the First Amendment even when done under the direction or control of a foreign organization.

The government misreads *Palestine Info. Office v. Schultz*, 853 F.2d 932 (D.C. Cir. 1988), as standing for the proposition that speech conducted under the direction or control of a foreign terrorist organization receives no, or limited, First Amendment protection. Cross-Pet. 8. That case addressed only the government's power to close a mission, and did not involve any attempt to prohibit individuals from speaking on behalf of the Palestinian Liberation Organization in the absence of a mission. The court went to great pains to explain that the PIO and its staff:

> are as free today as they were before [the issuance of a

In addition, the government's proposed narrowing construction is at odds with the purported rationale for AEPDA's prohibitions on the provision of material support to designated organizations, namely that all support must be prohibited because any support may free up a designated organization's resources for terrorist activities. Cross-Pet. 4 and 10. As the Ninth Circuit explained:

> Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits within the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment.

App. 14a.

The government does not even proffer a limiting construction of "training." Instead, it maintains that because some forms of "training" -- such as "training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds" (*see* Cross-Pet. 10) -- could be

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> State Department order pursuant to the Foreign Missions Act barring the PIO from operating as a foreign mission in the United States] to express whatever ideas they wish and to associate with whichever individuals they wish. They are not free, however, to set up an office that functions as a foreign mission for the Palestinian Liberation Organization when the State Department finds that the national interest requires otherwise.

853 F.2d at 934.

constitutionally proscribed, AEPDA's unlimited prohibition on all "training" is not vague. This is a non sequitur. The fact that a more clearly defined subset of activity may be constitutionally prohibited does not excuse the drafting of a vague and overbroad statute. On the contrary, the very fact that the government can identify in a more clearly defined way what should be prohibited simply illustrates that the vagueness inherent in "training" could easily be avoided. The fact that training in bomb-building is not protected does not justify the criminalization of training in human rights advocacy, peacemaking, kindergarten teaching, health services, or daycare provision. The term "training" is impermissibly vague in all its applications, because one simply cannot know what types of "training" are permitted and what types are proscribed.

Finally, AEDPA's prohibitions on the provision of "personnel" and "training" are unconstitutionally overbroad because they sweep within their ambit a substantial amount of political speech, advocacy, and association. *See Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). These terms criminalize virtually the entire range of associational human activity, much of which is indisputably protected by the First Amendment. Accordingly, the decision below is independently sustainable on the ground that the invalidated terms are not only vague, but substantially overbroad.

CONCLUSION

For all of the above reasons, the conditional cross-petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
CROSS-PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONERS

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REPLY BRIEF FOR THE CROSS-PETITIONERS

1. As the government's conditional cross-petition for certiorari explains (at 6-11), the court of appeals erred in sustaining the district court's grant of injunctive relief barring enforcement against respondents and their members of two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Under Rule 13.4 of the Rules of this Court, the government's conditional cross-petition for certiorari in this case "will not be granted unless another party's timely petition for a writ of certiorari is granted." In opposing the government's conditional cross-petition, the cross-respondents are therefore necessarily arguing that this Court should not consider the propriety of AEDPA's ban on the provision of "personnel" and "training" to designated foreign terrorist organizations *even if* the

Court elects to review the court of appeals' holding that the Act's prohibition of other forms of "material support or resources" to such organizations is constitutional. Cross-respondents make no effort to defend that proposition explicitly, however. If the Court does grant certiorari in this case, we see no justification for limiting its review to those portions of the court of appeals' ruling that are favorable to the government—particularly since to do so would leave in place the district court's preliminary injunction barring enforcement against cross-respondents and their members of provisions of an Act of Congress.

2. As the cross-petition for certiorari explains (at 7-8), AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations covers situations in which individuals have submitted themselves to the organization's direction or control, but does not restrict independent advocacy of the organization's interests or agenda. Although cross-respondents offer the conclusory assertion that "this construction lacks any support in the language of AEDPA" (Br. in Opp. 8), in fact our reading comports with dictionary definitions of the statutory term "personnel." See Cross-Pet. 7. Indeed, cross-respondents provide no authority for their suggestion that independent advocacy to the public that is supportive of a designated foreign terrorist organization would naturally be characterized as providing "personnel" to the organization itself. See 18 U.S.C. 2339A(b), 2339B(a)(1) (Supp. IV 1998).

Cross-respondents also assert (Br. in Opp. 9) that "the government's proposed narrowing construction is at odds with the purported rationale for AEDPA's prohibitions on the provision of material support to designated organizations, namely that all support must be prohibited because any support may free up a

designated organization's resources for terrorist activities." It may well be true that even independent advocacy in support of a foreign terrorist organization might in some circumstances assist the group in the sense of enabling it to divert resources to violent acts —although if the advocacy was truly independent, there is far less reason to suppose that it would substitute for advocacy that would be undertaken by the foreign terrorist organization itself. But however that may be, Congress can scarcely be faulted for seeking to combat terrorist activity in a way that does not trench upon the core First Amendment freedom of a United States citizen to express his own views upon matters of public concern. And it is perverse to suggest that because our straightforward construction of the prohibition against providing "personnel" to a designated foreign terrorist organization would not address harm that might result from independent advocacy to the public at large, the provision should be interpreted more broadly *and then declared unconstitutional.*

Cross-respondents also contend that AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations is unconstitutional even as applied to some situations in which an individual submits himself to the organization's direction or control. Cross-respondents assert (without citation to authority) that "[a]ctivities such as writing, speaking, and distributing literature are still protected under the First Amendment even when done under the direction or control of a foreign organization." Br. in Opp. 8 n.6. An individual who has agreed to subordinate his own views to those of a foreign terrorist organization, however, has a substantially reduced First Amendment interest in unrestricted communication of the group's message (as compared to an individual engaged in inde-

pendent expression of support for the organization's goals or methods). See Cross-Pet. 8.[1] The AEDPA "personnel" ban is therefore constitutional even as applied to services that involve communication. But even if AEDPA's application to some such conduct were thought to raise substantial constitutional con-

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[1] Contrary to cross-respondents' contention (Br. in Opp. 8-9), the court of appeals' decision in *Palestine Information Office* v. *Shultz*, 853 F.2d 932 (D.C. Cir. 1988), provides significant support for the government's position in this case. In upholding a State Department order closing the Washington, D.C., office of the Palestine Liberation Organization (PLO), the court of appeals explained:

> The associational interest of appellants is minimal to non-existent. The order does not prevent them from associating with any individual or group of individuals. It does not even prevent them from "associating" with the PLO in the normal sense of that word. It does not, for example, bar them from speaking with members of the PLO. It simply prevents them from acting as the organization's foreign mission. No court has ever found in the right to freedom of association a right to *represent* a foreign entity on American soil. The cases cited by appellants for this proposition are inapposite because, arising in the domestic context, they do not speak to the crucial issue of representation of foreign entities.

Id. at 941. Similarly here, AEDPA's "personnel" ban does not prevent cross-respondents from "associating" with any designated foreign terrorist organization, in the sense of speaking with the organization's members. Cross-respondents have no First Amendment right, however, to act as the agents of such a group. Equally pertinent is the court of appeals' observation in *Palestine Information Office* that "[e]ven if the appellants did have some minimal free association right that was infringed upon by the order, this court would be compelled to consider the strong interest of the government in defending the country against foreign encroachments and dangers." *Id.* at 941-942 (internal quotation marks omitted); see also *id.* at 939-940 (rejecting free speech claims).

cerns, there would be no basis for facial invalidation of the "personnel" ban. See *id.* at 8-9.

3. AEDPA's ban on the provision of "training" to designated foreign terrorist organizations is subject to a similar analysis. Cross-respondents assume that "training in human rights advocacy, peacemaking, kindergarten teaching, health services, or daycare provision" (Br. in Opp. 10) is fully protected by the First Amendment. We may assume, *arguendo*, that in other contexts, a prohibition on the provision of training in those fields could impose an impermissible burden on First Amendment freedoms. But where the recipient of assistance has been designated by the Secretary of State as a foreign terrorist organization, the individual's desire to engage in this particular form of association may be forced to give way to the government's compelling foreign policy and national security interests.

As the cross-petition explains (at 10), support of a designated foreign terrorist organization through "training," like the provision of cash or goods, may enable the organization to divert other resources to violent activities. Indeed, even training in seemingly innocuous activities may directly facilitate terrorist conduct. For example, training in how to drive a car or navigate a boat may enable the trainee to drive a car bomb into a United States embassy or commit a similar violent act against a United States vessel.

In any event, the "training" ban is indisputably valid as applied to such activities as the use of weapons or the construction of bombs. See Cross-Pet. 10. Cross-respondents contend that if the "training" prohibition is invalid in some of its applications, it is subject to facial invalidation on vagueness grounds, on the theory that "one simply cannot know what types of 'training' are

permitted and what types are proscribed." Br. in Opp. 10. That argument lacks merit. The "training" ban unambiguously covers instruction in weapons use or bomb-making, and therefore gives ample warning that training in those areas is proscribed.[2]

* * * * *

For the reasons stated above and the reasons stated in the conditional cross-petition for a writ of certiorari, if the petition for a writ of certiorari in No. 00-910 is granted, the cross-petition should also be granted. If

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[2] As a matter of statutory construction, there is no basis for cross-respondents' assertion (Br. in Opp. 10) that "one simply cannot know what types of 'training' are permitted and what types are proscribed." AEDPA unequivocally prohibits persons within the United States or subject to its jurisdiction from providing *any* form of "training" to designated foreign terrorist organizations. Cross-respondents seem to argue that the effective reach of the Act is unclear because some of its applications may be unconstitutional. Cross-respondents cite no authority, however, suggesting that a statute may be deemed impermissibly vague (and therefore subject to facial invalidation) simply because particular applications of the law raise close constitutional questions.

Rather, cross-respondents' contention that the "training" ban is invalid in all its applications because it is invalid in some is properly analyzed as an overbreadth rather than a vagueness challenge. But even in a First Amendment challenge, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *Houston* v. *Hill*, 482 U.S. 451, 458 (1987); see also, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) (facial invalidation "has been employed by the Court sparingly and only as a last resort") (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)). As the cross-petition explains (at 10-11), AEDPA's "training" ban is constitutional in the vast majority of its intended applications; possible constitutional infirmities in isolated applications of the statute provide no basis for the injunction entered by the district court in this case.

the Court denies the petition in No. 00-910, the cross-petition should be denied.

Respectfully submitted.

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